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No. 91-186

Supreme Court, U.S.

FILED

OCT 21 1991

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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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MID-OHIO COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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### **QUESTION PRESENTED**

Whether the Federal Communications Commission properly denied a broadcast license renewal application, based on the applicant's misrepresentation and lack of candor.



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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. A1) is unreported. The decisions of the Federal Communications Commission (Pet. App. E1-E4, F1-F8) are reported at 5 FCC Rcd 940 and 5 FCC Rcd 4596.

## **JURISDICTION**

The judgment of the court of appeals was entered on April 30, 1991. The petition for a writ of certiorari was filed on July 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Mid-Ohio Communications Inc., sought to renew its broadcast license for a facility in Westerville, Ohio. In support of its application, Mid-Ohio claimed that Richard Nourse, its vice-president and 25% stockholder, was working as the fulltime station manager and that he would continue to do so if the license were renewed. This representation was made in an effort to earn Mid-Ohio an important credit under the "integration criterion" of the Commission's comparative licensing policy, which recognizes the importance of integrating ownership with day-to-day management. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395 (1965). On September 16, 1983, an administrative law judge (ALJ) issued an initial decision denying the application of Mid-Ohio and granting the application of a competitor, Metro Broadcasting, Inc. Pet. App. B1-B21.

On numerous occasions, beginning in September 1982 and continuing through October 1983, Mid-Ohio reaffirmed Richard Nourse's fulltime management of the broadcast station and made no mention of any other simultaneous employment of Richard Nourse. On November 2, 1983, while Mid-Ohio's exceptions to the ALJ's initial decision were pending, Metro filed a motion to reopen the record to determine whether the representations underlying Mid-Ohio's integration claims were false and misleading. Metro asserted that it had learned that Richard Nourse was employed at an automobile dealership, Pioneer Chevrolet-Cadillac, Inc., located in Marietta, Ohio, which is 120 miles from Westerville. Pet. App. C1-C5.

2. The ALJ reopened the record and held an additional hearing.\* Mid-Ohio revealed for the first time that Richard Nourse had been spending time at the automobile dealership in Marietta. Specifically, he spent two days a week managing the dealership from October 1982 through December 1982, and three days a week doing so from January 1983 through September 1983. Mid-Ohio added that as of November 1983, Richard Nourse was the general manager of the dealership and was spending 36 hours per week there. See Pet. App. C3-C11. The ALJ also received testimony concerning Richard Nourse's alleged managerial responsibilities at the broadcast station. *Id.* at C11-C20.

The ALJ concluded that Mid-Ohio's representations concerning Nourse's other employment was a "critical factor" in the licensing determination:

Where a representation is made that a principal will be integrated on a 40 hour per week basis, other demands on his time are always relevant in determining the credibility of the proposal, particularly where they regularly involve travel outside the immediate area of the station.

Pet. App. C22-C23. The ALJ found that Mid-Ohio had made a deliberate decision "not to volunteer the information" concerning Richard Nourse's time spent at the car dealership, and that the nondisclosure was "misleading and lacking in candor." *Id.* at C25. The ALJ criticized Mid-Ohio's decision "to finesse the matter" as "a serious error in judgment and one which does violence to the processes of the Commission." *Id.* at C26. He con-

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\* Metro ultimately entered into a settlement with Mid-Ohio, Metro's application was dismissed, and it did not participate in the subsequent proceedings. Pet. App. C3, D2 n.1.



cluded, however, "that denial of the application would be an action more severe than is warranted," *ibid.*, and that "the censure expressed in the preceding paragraphs must suffice," *id.* at C27.

3. The Commission's Review Board disagreed with the ALJ's conclusion that Mid-Ohio's lack of candor did not warrant denial of Mid-Ohio's application. Pet. App. D1-D40. The Review Board carefully reviewed the record and concluded that Mid-Ohio had misrepresented that Richard Nourse assisted the general manager in overseeing the day-to-day operation of the station. *Id.* at D33. It observed, for instance, that Nourse never had an office (or even a desk) at the station and that he was never on the station's payroll. *Id.* at D14, D33. The Review Board noted also that even when Richard Nourse was present at the station, his duties often consisted of such tasks as organizing files, helping to remove trash and litter around the studio, typing catalogue cards, and organizing office space. *Id.* at D13-D14, D27.

The Board agreed with the ALJ that the time spent by Richard Nourse at the car dealership was "a critical factor in assessing his and [Mid-Ohio's] integration proposal" and that Mid-Ohio "should have disclosed this pertinent and significant fact on numerous subsequent occasions" after Richard Nourse resumed his employment there in October 1982. Pet. App. D26, D29. Instead, Mid-Ohio "willfully and repeatedly continue[d] its misrepresentations on numerous occasions," citing the pleadings that reaffirmed Nourse's fulltime management of the station and omitted any mention of his management of the automobile dealership. *Id.* at D29.

Turning then to the question of an appropriate sanction, the Board said: "A licensee's record of noncompliance with the Commission's Rules

provides direct evidence of anticipated future behavior as a public trustee. The record in this proceeding reveals direct evidence of [Mid-Ohio's] total disregard for the need to be truthful and honest with the Commission." Pet. App. D33. The Board noted the "'fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission.'" *Id.* at D34. It explained that lack of candor "can in and of itself lead to the sanction of disqualification," *ibid.*, and it concluded that Mid-Ohio "has not demonstrated that it is qualified to be a broadcast licensee," *id.* at D37.

4. The Federal Communications Commission affirmed the Review Board's decision. It rejected Mid-Ohio's contention that the Board had improperly overruled the ALJ's credibility findings and ignored uncontroverted testimony. Rather, the Commission explained, the Review Board differed with the ALJ as to the ultimate interpretation that should be given the findings of fact on which they agreed, and it focused on aspects of the record that the ALJ did not specifically address. Pet. App. E2. See also *id.* at F3, F7 n.9. The Commission also concluded that the disqualification was warranted under the facts of this case. The Commission stated that "the record indicates a pattern, throughout this proceeding, of deliberate concealment and false statements regarding a matter of potential crucial importance." *Id.* at E3. The court of appeals affirmed the Commission's order without opinion. *Id.* at A1.

#### ARGUMENT

1. Petitioner contends that the Federal Communications Commission lacks authority to deny a broadcast license based on a "single" instance of mis-

representation or lack of candor. Pet. 10. This Court, however, has long recognized that the Commission has broad authority to deny a license for lack of candor, and that Congress has authorized "the Commission, not the courts," to exercise discretion in evaluating whether an applicant's misrepresentation or nondisclosure warrants denial of the application. *FCC v. WOKO*, 329 U.S. 223, 228-229 (1946). The Commission's decision simply reflects a reasonable exercise of that discretion in light of the facts of this case. See *Character Policy Statement*, 102 F.C.C.2d 1179, 1209-1211 (1986) (explaining the paramount importance of truthfulness in dealing with the Commission and, correspondingly, the penalties that may attend misrepresentation and lack of candor).

2. Petitioner next contends that the Commission should employ a "clear and convincing evidence" standard in determining whether to renew a broadcast license. Pet. 10. This Court, however, has specifically held that adjudicatory proceedings under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, are subject to the "preponderance of the evidence" standard. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). As petitioner concedes, Pet. 10 n.4, the Commission applies that standard in its licensing proceedings. There is no basis for making an exception in petitioner's case.

3. Petitioner argues that a different standard of review should apply where "the ALJ's credibility findings were reversed by the Review Board and the Commission." Pet. 10-11. The APA, however, does not provide for such an exception. In any event, the Commission and the Review Board did not reverse any factual findings by the ALJ as to which demeanor was critical. See Pet. App. E2, F7 n.9. There was no disagreement with any of the ALJ's findings as to

what Richard Nourse did when he was participating in the conduct of the broadcast station's business. The Commission and the Review Board instead disagreed with the ALJ over whether that participation could fairly be described as that of a fulltime station manager. See *id.* at E4 n.3. The Commission's resolution of that issue against petitioner is supported by substantial evidence and is otherwise lawful. See 5 U.S.C. 706(2)(A) and (E).

4. Petitioner also contends that the Review Board's use of automotive terms in its opinion "repeatedly degraded the Nourses because of their affiliation with the automobile industry." Pet. 11. The Commission, however, disavowed those comments by the Review Board that could be considered derogatory to people involved in the automobile industry, Pet. App. E4 n.4, and the Commission made clear its view that the record, apart from those "inappropriate comments," supported conclusions adverse to petitioner. *Id.* at F7 n.9.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1991